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NO. 82-963

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

OSBORNE SHEPPARD,
Respondent.

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ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT
OF MASSACHUSETTS

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# REPLY BRIEF FOR PETITIONER

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I. THE LOWER COURT FOUND PROBABLE CAUSE.

For the first time respondent argues in this court that the judge issuing the warrant did not find that probable cause had been established to search for the items listed in the affidavit. See Respondents' Brief, 25-26, 97-98. This suggestion is totally at odds with the defendant's position before the Supreme Judicial Court in which he acknowledged:

> "Judge Feeney reviewed the applications and determined that they set out facts sufficient for probable cause for the search and the arrest." Brief of the Appellant Sheppard, 28.1/

Again, the defendant conceded, "[a]ll of the facts contained in the affidavit and upon which the court relied in its finding of probable

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1/ A copy of the defendant's brief has been lodged with clerk.

cause..." Brief of the Appellant Sheppard at 33. Defendant quite reasonably did not question whether or not the judge found probable cause, since it is clear that the judge signed the warrant. (J. App. 18a).

The Supreme Judicial Court, as had the Superior Court, clearly concluded that the warrant had issued upon a finding of probable cause (Comm. v. Sheppard, 387 Mass. 488, 502 (App. 54a), and the defendant never attacked this finding below. Indeed, the defendant argued below that the facts supporting the findings of probable cause had been improperly obtained through the interrogation of the defendant and he attacked the facial validity of the warrant. The Supreme Judicial Court formulated the issue to be decided as

"whether the exclusionary rule ... requires the suppression of incriminating evidence obtained in the

course of a police search conducted in good faith, but pursuant to a warrant which, although issued on probable cause, violated the constitutional and statutory requirements that search warrants describe the things to be seized."

Sheppard, 387 Mass. 488-489 (App. 40a-41a). Never having questioned whether such a finding had been made below, respondent should not be permitted to do so at this level. See Illinois v. Gates, 103 S.Ct. 2317 (1983); Hill v. California, 401 U.S. 797, 805-806 (1971).

## II. THERE IS NO INCONSISTENCY BETWEEN THE HISTORY OF THE FOURTH AMENDMENT AND A REFUSAL TO EXCLUDE THE EVIDENCE SEIZED IN THE INSTANT CASE.

Respondent argues that the Framers "knew the price" of suppressing relevant evidence "from the outset." and that a finding that violation of the particularity requirement was harmless would ignore the language and history of

the Fourth Amendment (Respondents Brief, 75, 99).

Respondent, it is submitted, fails to fully appreciate the history of the Fourth Amendment. The Amendment grew out of the colonists' negative reaction to the use of the general warrant and writs of assistance.[2/] The basic evils inherent in the existence of the writ of assistance were most notably reflected by James Otis in arguing against the issuance of new writs of assistance to enforce customs laws after the death of George II. As the argument is recounted in 2 Legal Papers of John Adams, 106-147 (L. Wroth & M. Zobel eds.

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2/ See gen. N. Lasson, The History and Development to the United States Constitution 51-105 (1970), and J. Landynski, Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation 30-48 (1966).

1965), Otis attacked four aspects of the general writ: first, that the writ was Universal in that it was directed to all subjects in the Kings domain; second, that it was Perpetual, in that there was no return and it remained in effect for the life of the sovereign, third, that a person armed with the writ could enter all houses and shops at will and fourth, not only were custom officials empowered with the light of entry, but every person. Petition of Lechmere, Adams, at 142-143. The thrust of the argument was that parliamentary power was not absolute, but bounded by the constitution or fundamental principles Id., at 144. Given the background of the Fourth Amendment - to guarantee against legislative or executive ability to authorize continuous licence to invade ones home or shop to rummage

among ones belongings for any uncustomed goods - the leap made by respondent to an assertion that the framers contemplated exclusion of relevant evidence in criminal cases as a remedy for Fourth Amendment violation is totally without historical support.

Moreover, Justice Stewart specifically refutes respondents' contention in discussing whether either the fourth or fifth amendments directly require exclusion of illegal evidence, stating:

> "Neither provision explicitly creates a right to have unconstitutionally acquired evidence excluded from judicial proceedings. Furthermore, there is nothing in the events giving rise to the adoption of the fourth or fifth amendments that supports the view that the provisions were intended to require exclusion since ... common law courts did not exclude evidence simply because it was obtained by unlawful means." (footnote omitted) Stewart, The Road to Mapp v. Ohio and Beyond: The Origens, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Col. L. Rev 1365, 1381 (1983).

## CONCLUSION

For the reasons stated in their brief and in this reply brief, petitioner respectfully requests this Court to reverse the judgement of the court below.

Respectfully submitted,

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